MAR 9 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1282

GREGORY Y. LAU,

Petitioner,

—v.—

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES; LEONARD F. CHAPMAN, JR., COMMISSIONER OF IMMIGRATION AND NATURALIZATION SERVICE; AND S.F. PERRYMAN, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, CLEVELAND, OHIO.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LEONARD J. SCHWARTZ
595 E. Broad Street
Columbus, Ohio 43215
614/221-1160

JAMES D. MCNAMARA
595 E. Broad Street
Columbus, Ohio 43215
614/221-1160

Attorneys for Petitioner

February 1976

BLEED THROUGH

INDEX

Page

Jurisdiction.....2

Questions Presented.....2

Citations to Opinions Below.....2

Constitutional Provisions Involved.....3

Statement of the Case.....3

Reasons for Granting a Writ

1. This Court has never directly ruled upon an important question of constitutional law involved herein. Further, there is now a clear split of opinion on the issue among the Circuit Courts of Appeals.....10

2. The Court of Appeals has decided a basic issue of constitutional law in a manner in direct conflict with a consistent line of controlling decisions of this Court. Moreoever, it has done so in a backhanded manner by refusing to even mention this issue in its opinion.....15

Conclusion.....19

Appendix

Opinion of the United States Court of Appeals for the Sixth Circuit affirming the United States District Court.....1a

Opinion of the United States District Court for the Southern District of Ohio.....3a

Table of Authorities

Cases:

Ahrens v. Rojas, 292 F2d 406 (5th Cir 1961).....13

Bergman v. INS, 351 F2d 401 (9th Cir. 1965).....12

Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974).....14

Cubillos-Gonzalez v. INS, 352 F2d 782 (9th Cir 1965).....12

Jarecha v. INS, 417 F2d 220 (5th Cir. 1969)...13

Jay v. Boyd, 351 U.S. 345 (1956).....10, 11

Kleindienst v. Mandel, 408 U.S. 753 (1972).....10, 12

Loza-Beydoya v. INS, 410 F2d 343 (9th Cir 1969).....13

Obrenovic v. Pilliod, 282 F2d 874 7th Cir. 1960).....13

Rossano v. I.N.S., 492 F2d 229 (7th Cir. 1974.....12

Service v. Dulles, 354 U.S. 363 (1957).....18

BLEED THROUGH

Sung v. McGrath, 339 U.S.33 (1950).....11

United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).....18

United States ex rel. Exarchou v. Murff, 265 F2d 504 (2d Cir. 1959).....12

Vitarelli v. Seaton, 359 U.S. 535 (1959).....18

Wong Wing Hang v. INS, 360 F2d 715 (2nd Cir. 1966).....12, 13

Yamataya v. Fisher, 189 U.S. 86 (1903).....11

Statutes:

Title 28, United States Code, Section 1254 (1).....2

Federal Regulations:

8 C.F.R. Section 204.1(c)(5).....16

8 C.F.R. Section 214.2(f)(7).....16

8 C.F.R. Section 243.3.....16

8 C.F.R. Section 244.2.....17

Articles:

Violations by Agencies of Their own Regulations, Harv. L. Rev. 87:629-55 Jan. '74.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. -------

GREGORY Y. LAU,

Petitioner,

—v.—

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES; LEONARD F. CHAPMAN, JR., COMMISSIONER OF IMMIGRATION AND NATURALIZATION SERVICE; AND S.F. PERRYMAN, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, CLEVELAND, OHIO.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on October 17, 1975.

Jurisdiction

The judgment of the Court of Appeals was entered on October 17, 1975. A petition for rehearing was denied by the Court of Appeals on November 25, 1975. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether the Immigration and Naturalization Service may deny a deportable alien discretionary relief without stating any reason or explanation for said denial.

2. Whether failures of the Immigration and Naturalization Service to give notice of and reasons for denials of discretionary relief to an alien, which failures are direct violations of Immigration and Naturalization Service regulations, constitute violations of the due process guarantees of the Fifth Amendment.

Citations to Opinions Below

The February 21, 1975, opinion of the United States District Court for the Southern District of Ohio, Hon. Robert M. Duncan, U.S.D.J., is set forth in the Appendix at p. 3a . The opinion of

the United States Court of Appeals for the Sixth Circuit, affirming the District Court, is set forth in the Appendix at p. 1a.

Constitutional Provisions Involved

1. United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case

Petitioner, plaintiff below,[1] is a citizen of Hong Kong and an alien in this country. Mr. Lau was born in Hong Kong and lived there until August of 1969.

Mr. Lau entered this country in 1969 as a non-immigrant on a temporary visa. He received his

---

[1] Hereinafter the parties will be referred to according to their designation in the trial court.

B.A. degree from Capital University in Columbus, Ohio, in 1972. While attending Capital University Mr. Lau worked in the respiratory therapy unit at Childrens Hospital in Columbus.

In the fall of 1973 Mr. Lau was accepted and participated in an intensive accelerated respiratory therapy program at the University of Chicago. He received a diploma as a respiratory therapist, and returned to Childrens Hospital in Columbus, where he has been employed since.

Presently Mr. Lau works forty hours per week as a full time respiratory therapist at Childrens Hospital and also an additional forty hours per week as a full time education coordinator in the respiratory care division at Doctors Hospital of Columbus, Ohio.

Mr. Lau's work at Childrens Hospital involves the treatment of young children with cystic fibrosis and other serious respiratory ailments. His work is primarily in the intensive care ward. He is responsible for monitoring those patients who are aided by various respiratory equipment, and for the use and adjustment of that equipment consistent with changes in the patient's conditions. Mr. Lau's work at Childrens Hospital is of a serious nature, and he is personally credited with saving the lives of several patients. Mr. Lau has a superb work record. He is greatly respected by the physicians and

others at the hospital. Because of his educational background and experience Mr. Lau has become one of the foremost respiratory therapists in Ohio.

His work as educational coordinator at Doctors Hospital involves the training and supervision of approximately seventy respiratory technicians. He lectures to respiratory technicians, nurses and physicians regarding new developments in the field. He also is responsible for certain research projects and for the development of a library for respiratory therapy. Finally, he is the liaison between Doctors Hospital and local universities in regard to respiratory care.

Mr. Lau has no criminal conviction or arrest record of any kind. He has never been charged with any falsification or other deception regarding immigration matters, he does not use any illegal drug and he does not use alcohol. He is not, and has never been, a ward of the state or the recipient of any kind of public relief. He has no endangering mental or physical afflictions. He has no political beliefs or associations that might be construed as contrary to the interests of the United States. The evidence indicates that he is a model citizen, well liked and respected by those around him.

In addition to plaintiff's background and qualifications it was elicited at the District Court that there is a present severe shortage of respiratory therapists in central Ohio. There are simply not enough qualified people to fill the available positions as respiratory therapists.

Mr. Lau was admitted into this country as a nonimmigrant on a temporary visa. He was required by the Immigration and Naturalization Service[2] to periodically reapply for extensions of his visa every six months. This he did by preparing a form I-538 and mailing it to the I.N.S. office. These requests for discretionary extension were routinely granted many times over the years.

In May of 1974, as he had done so many times before, Mr. Lau prepared and filed his I-538 form with I.N.S. He was never notified of any decision on this request for extension.

Plaintiff continued to live and work as usual for a period of several months. Finally, in September of 1974, Mr. Lau was ordered to appear at a deportation hearing to show cause why he should not be deported for staying in this country

---

[2] Hereinafter the Immigration and Naturalization Service will be referred to as I.N.S.

BLEED THROUGH

past the expiration (June, 1974) of his visa. It was at this point that plaintiff was informed that his request for an extension of his visa had been denied. This was the first instance in which Mr. Lau was denied discretionary relief without any reason or explanation.

Plaintiff appeared at the hearing on October 24, 1974, and was ordered deportable because he had, technically, overstayed his visa. However, he was given until December 31 to voluntarily depart and that date was later extended to January 31, 1975, at the request of United States Senator Robert Taft who interceded on Mr. Lau's behalf.

On November 14, 1974, plaintiff filed a Petition to Classify Preference Status of Alien on Basis of Profession or Occupation, form I-140. Although this application was denied, plaintiff was never notified of that denial and only discovered it during the course of litigation in the District Court. Thus, for the second time, INS denied a request for discretionary relief by Mr. Lau without notifying him of their decision and without giving any reason or explanation for that decision.

In addition to the two applications discussed above (forms I-538 and I-140), plaintiff through

his counsel wrote two letters to District Director Perryman of the INS requesting discretionary stays of Mr. Lau's voluntary departure date. These requests were submitted on December 23, 1974, and February 5, 1975, respectively. Each request was denied without explanation or reason.

Thus, plaintiff filed four separate requests for discretionary relief from deportation: form I-538, form I-140, the letter of December 23, 1974, and the letter of February 5, 1975. All four requests were summarily denied. At no time was plaintiff provided a rationale or explanation for any of these decisions against him.

The plaintiff filed a complaint in the District Court for the Southern District of Ohio, seeking an order enjoining the defendants from proceeding with the deportation of the plaintiff.[3] The District Court denied the request for a permanent injunction. The plaintiff then appealed to the

---

[3] Originally this case was brought as *Lau v. Saxbe* rather than Levi. However, in granting plaintiff's motion for stay of mandate Mr. Justice Stewart substituted the name of Edward H. Levi as Attorney General of the United States. To the extent that that is insufficient to formally substitute parties, plaintiff hereby moves this Court to substitute Edward H. Levy in place of William Saxbe. This request is made pursuant to Rule 25(d), Federal Rules of Civil Procedure.

BLEED THROUGH

United States Court of Appeals for the Sixth Circuit.

The Court of Appeals passed on the federal questions tendered herein. That Court held:

> It is appellant's position that the District Director was required to give reasons for his denial of discretionary relief and that such denial should be treated as wholly arbitrary in the absence of a statement or explanation by the District Director of his denial...
>
> Appellant has produced no authorization holding which supports his position in this case, and who have found none.

Appendix at p. 1a & 3a.

Subsequently plaintiff requested a stay of mandate pending the filing of a writ of certiorari. That motion was granted by Mr. Justice Stewart (No. A-586).

BLEED THROUGH

REASONS FOR GRANTING A WRIT

1. This Court has never directly ruled upon an important question of constitutional law involved herein. Further, there is now a clear split of opinion on the issue among the Circuit Courts of Appeals.

One of the questions presented here has obvious importance in the nationwide administration of the immigration laws -- Can the Immigration and Naturalization Service ("INS") refuse a deportable alien discretionary relief without stating any reason? While the Court had the opportunity to discuss the requirement of reasons in *Jay v. Boyd*, 351 U.S. 345, 360-61 (1956), it declined the occasion and held that petitioner was provided with sufficient reasons when told that the information was confidential, the disclosure of which would be prejudicial to the public interest, safety or security. Moreover, the Court, in *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972), declined the invitation of the Government to reach the question of whether the Executive could give "any reason or no reason," holding that appellee was given a facially legitimate and bona fide explanation in that case.

This case, then, can be the opportunity for the Court to announce, on the one hand, the extent to which *Jay v. Boyd* limits the due process rights of aliens within this country,[4] or, on the other hand, the degree to which its application is limited to the peculiar circumstances required by national security. That is, this case clearly presents the question not reached in the earlier two cases of whether or not the INS must give a deportable alien a reason for its denial of discretionary relief.[5]

---

[4] Of course, an alien within the United States, unlike one applying for entry at the border, is entitled to the full benefits of procedural due process under the aegis of the Fifth Amendment to the United States Constitution, *Sung v. McGrath*, 339 U.S. 33 (1950), *Yamataya v. Fisher*, 189 U.S. 86 (1903).

[5] It must be noted that the fact of deportability cannot of itself be an acceptable explanation for a denial of discretionary relief. The irrelevance of the deportation hearing and the order finding appellant deportable is apparent. It is only after deportability is ordered that the opportunity for exercise of discretion arises. Thus, *all* applicants for discretionary relief have been found deportable, and the problem for the INS officials (in this case the District Director, Mr. Perryman) is to choose which of these deportable aliens will be given discretionary relief and which will not. It follows that the fact of deportability itself cannot be grounds for distinguishing among applicants since they are all by

BLEED THROUGH

In the case at bar the Government successfully renewed in the Sixth Circuit the position it first advanced here in *Kleindienst v. Mandel* that "the Executive in its sole and unfettered discretion" could give "any reason or no reason." 408 U.S. at 769. In this case the Government convinced the Sixth Circuit that "no reason" was necessary. Of course, such a ruling tramples on the traditional view that an alien is entitled to relief if the denial was an abuse of discretion, made without a rational explanation. *See, e.g., Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715, 719 (2nd Cir. 1966). Under the decision below, discretion is no longer necessary since without reasons given the courts cannot judge their rationality. Until the opinion below, no court had taken such an arbitrary and narrow view.[6] Rather, the import of the Court of Appeals

---

definition deportable. If they were not they would have no need for discretionary relief in the first place.

[6] Although in most reported cases the courts have upheld as rational the explanations given by the INS for denials of discretionary relief. However, in a few instances courts have held that, even with an enunciated reason, the decision was abusive. See, for example, *Rassano v. INS*, 492 F2d 229 (7th Cir. 1974); *Cubillos-Gonzalez v. INS*, 352 F2d 782 (9th Cir. 1965); *United States ex rel. Exarchou v. Marff*, 265 F2d 504 (2d Cir. 1959); *Bergman v. INS*, 351 F2d 401 (9th Cir. 1965).

decisions with the exception of the Sixth is that a reason is necessary! *Loza Bedoya v. I.N.S.* 410 F.2d 343, 346 (9th Cir. 1969); *Hang v. I.N.S.* 360 F.2d 715, 719 (2d Cir. 1966); *Ahrens v. Rojas*, 292 F.2d 406, 411 (5th Cir. 1961); *Obrenovic v. Pilliod*, 282 F.2d 874, 876 (7th Cir. 1960)[7]

Since the Government is taking the position the denials of discretionary relief may be made without reason and is now supported in its position by the Sixth Circuit, the issue raised by this Petition is of the utmost national significance and affects literally thousands of persons

---

[7] Most of the Court of Appeals decisions on this point seem to *assume* the question of whether any reason is necessary. They then go on to consider whether the reason given in each particular case is a rational one, and therefore not an abuse of discretion. One court has even gone so far as to suggest that factual findings upon which a discretionary decision is predicated must pass the substantial evidence test, and that a written decision of the administrative agency must set out clearly the ground which forms the basis for denial of discretionary relief, "so that the appellate bodies within the agency and the reviewing courts are able to ascertain whether the decision is arbitrary, capricious or not supported by reasonable, substantial and probative evidence . . . ." *Jarecha v. I.N.S.*, 417 F.2d 220, 225 (5th Cir. 1969).

annually. If the Court of Appeals decision in this case is allowed to stand, two results will almost certainly follow. First, the Immigration and Naturalization Service will be encouraged to omit explanations for all future discretionary decisions because, while a given reason might be held irrational or abusive, a total failure to give a reason will avoid the question of rationality altogether. Second, judicial review of I.N.S. discretion will effectively be curtailed, leaving this administrative agency free to act upon its own instincts, including whatever prejudices and prejudgments may influence its decisions from time to time. The issue should not be left unresolved by this Court.[8]

---

[8] While the Immigration and Naturalization Service is admittedly in a unique position among federal administrative agencies, because of the particular "client group" with which it is concerned, this Court's recent decisions regarding other administrative agencies clearly indicate a desire for rationality and accountability in the exercise of discretion. This is true even though judicial review of such decisions is of a limited nature. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974).

2. The Court of Appeals has decided a basic issue of constitutional law in a manner in direct conflict with a consistent line of controlling decisions of this Court. Moreover, it has done so in a backhanded manner by refusing to even mention this issue in its opinion.

As indicated above, Mr. Lau filed four separate requests for discretionary relief from deportation: form I-538 (extension of visa), form I-140 (petition to classify alien on basis of occupation), and the letters of December 23, 1974, and February 5, 1975, requesting stays of deportation.

With regard to Mr. Lau's I-538 application, 8 C.F.R. Section 214.2(f)(7), referring to such applications, reads as follows:

> Decision on application for extension, permission to transfer to another school, or permission to accept or continue employment. *The applicant shall be notified of the decision, and if the application is denied, of the reason therefor.* (emphasis added).

Defendants never notified plaintiff of their decision to deny his I-538 petition. Needless to say, they also did not provide him with the reason for that denial.

PLEASE THROUGH

With regard to Mr. Lau's I-140 petition, 8 C.F.R. section 204.1(c)(5), referring to such petitions, states:

> Interview and Decision. The petitioner shall be notified of the decision, and if the petition is denied, of the reasons therefor and of his right to appeal in accordance with the provisions of Part 103 of this chapter.

Again, defendants totally failed to comply with the above regulation. They did not notify plaintiff that his petition had been denied.

Plaintiff's letters of December 23, 1974, and February 5, 1974, were written to District Director Perryman and requested postponements of Mr. Lau's voluntary departure date. The District Director's authority and obligations concerning such requests are set out in the following regulations:

> 8 C.F.R. Section 243.4 Stay of Deportation . . . The district director, in his discretion, may grant a stay of deportation for such time and under such conditions as he may deem appropriate. *Written notice of the disposition of the alien's request shall be served upon him*, but neither the making of the request nor the failure to receive notice of the decision thereon shall relieve or excuse the alien from presenting himself for

> deportation at the time and place designated for his deportation. (emphasis added).[9]
>
> 8 C.F.R. section 244.2 Extension of time to depart. Authority to extend the time within which to depart voluntarily . . . is within the sole jurisdiction of the district director . . . *Written notice of the district director's decision shall be served upon the alien*, and no appeal may be taken therefrom. (emphasis added).

Once again defendants failed to follow their own regulation. Mr. Lau's requests were summarily denied but no reasons were given.

The Court of Appeals makes no mention whatsoever of these regulatory violations in its opinion, although the issue was briefed and argued.

---

[9] The latter clause of this regulation, as the District Court correctly noted is intended to prevent a situation where an alien would file such a request at the last minute and then ignore his departure date in reliance on this regulation. On the other hand, the "disclaimer clause" does not relieve the I.N.S. from their obligation to follow the rest of the regulation, which they have failed to do in the present case.

BLEED THROUGH

Mr. Lau contends that the Court of Appeal's cavalier attitude toward these indisputable regulatory violations was incorrect as a matter of law.

The case of *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954), established the basic tenet in regard to the present question by holding that regulations prescribing procedures to be followed in processing an alien's application for suspension of deportation have the force and effect of law and violations of such regulations constitute a denial of due process.

As stated by Justice Harlan in *Service v. Dulles*, 354 U.S. 363, at page 372, (1957)

> [R]egulations validly prescribed by a government administrator are binding upon him as well as the citizen, and . . . this principle holds even when the administrative action under review is discretionary in nature.[10]

---

[10] Not every technical violation of an administrative regulation rises to the level of a due process violation. The violations involved in this case clearly do. One relevant question seems to be whether the regulation was designed to govern internal agency procedure rather than to protect any interest of the objecting party. See *Vitarelli v. Seaton*, 359 U.S. 535 (1959); see also *Violations by agencies of their own Regulations*, Harv. L. Rev. 87: 629-55 Jan. '74.

Further, an alien has a right to have his application considered in conformity with regulations. *Blazina v. Bouchard*, 286 F.2d 507 (3d Cir. 1961), *cert. denied*, 366 U.S. 950 (1961); *Sovich v. Esperdy*, 319 F.2d 21 (2d Cir. 1963).

At trial the government admitted its failure to follow its own regulations. However, the District Court and Court of Appeals refused to recognize such patent and repeated breaches as violations of due process. The plaintiff was haughtily mistreated by the INS, without a modicum of lipservice paid to procedural fairness. This Court should reassert, through the instant case, its commitment to the proposition that regulations established to govern the conduct of the INS must be fully and evenly obeyed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit. In addition, it is respectfully suggested that a summary reversal on the papers is appropriate because the decision by the court below so clearly fails to take into consideration established principles of constitutional law.

Respectfully submitted,

LEONARD J. SCHWARTZ
595 E. Broad Street
Columbus, Ohio 43215
614/221-1160

JAMES D. MCNAMARA
595 E. Broad Street
Columbus, Ohio 43215
614/221-1160

Attorneys for Petitioner

February 1976